

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID ATLEE PHILLIPS :
Plaintiff :
v. : Civil Action No. 81-1407
DONALD FREED et al. : Judge Jackson
Defendants :

DAVID ATLEE PHILLIPS :
Plaintiff :
v. : Civil Action No. 81-2578
LAWRENCE HILL & CO. : Judge Jackson
PUBLISHERS, INC. et al. :
Defendants :

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION TO COMPEL DEFENDANT FREED'S ANSWERS
TO INTERROGATORIES AND DEPOSITION QUESTIONS

1. Fed. R. Civ. P. 37(a)(2).
2. Plaintiff moves to compel defendant Freed's
Answers to certain of Plaintiff's First Interrogatories in
Civil Action No. 81-1407 and to certain of Plaintiff's
Interrogatories in Civil Action No. 81-2578. The unanswered
interrogatories and defendant Freed's objections thereto are
as follows:

INTERROGATORY NO. 15

State whether you are a member or supporter of a
political party or parties in the United States, or elsewhere;
and describe your participation or support for said party or
parties.

OBJECTION

Not relevant to the subject matter involved in the pending action. Privileged under the First Amendment to the United States Constitution.

INTERROGATORY NO. 16

State whether you have ever engaged in or participated in any political activities. If so, describe in detail your activities; including the following:

(a) whether you are or were a founder, leader, member, or ever associated with or assisted the "Friends of the Black Panthers," whether such is an organization designed to assist or raise funds in behalf of the Black Panther Party; if so, describe in detail your activities or involvement with the aforesaid organization;

(b) whether you are presently assisting the Black Panther Party in any manner;

(c) whether you have ever or presently support the objectives, causes and goals of the Black Panther Party; if so, describe in detail your participation or support of said party;

(d) whether you have ever met, known, or assisted or are friends with Huey P. Newton; if so, describe your political activities with Mr. Newton, if any;

(e) whether you are or were a founder, leader, supporter or member of the "Committee for Justice for Huey P. Newton"; if so, state in detail the purpose, objectives and function of said Committee and describe in detail your activities or involvement with said Committee.

(f) whether you have ever been or are a leader, member, supporter or participant of the "John Brown Brigade"; if so, state in detail the purpose(s) and function(s) of said group, and describe in detail your activities in said group;

(g) whether you have ever been or are a leader, supporter or member of the "Friends of Operation Bootstrap"; if so, state in detail the purpose(s), objective(s) and function(s) of said group and describe in detail your activities in said group;

(h) whether you have ever been or are a leader, supporter or member of the "Libertarian Union"; if so, state in detail the purpose(s), objective(s) and functions of said group and describe your activities in said group;

(i) whether you have ever been or are a leader, supporter or member of the "Campaign for Democratic Freedom"; if so, state the purpose(s), objective(s) and function(s) of said group and describe in detail your activities in said group;

(j) whether you assisted in organizing or participated in a three day conference during 16-18 May 1975 on the campus of the University of California at Los Angeles (UCLA) entitled "Conspiracy in America: From Dallas to Watergate"; if so, describe the topics and subject matters of said conference and describe your activities or involvement with said conference including:

(1) whether you engaged in a long distance telephone conversation with Philip Agee during the aforesaid conference; if so, state when and where Mr. Agee was located during said telephone conversation; and

(2) describe in detail the subject matter and topics discussed during your telephone conversation with Mr. Agee, if any; and

(k) whether you ever were or are a co-founder, director, supporter, leader or member of the "Peoples Temple's Citizens Commission of Inquiry"; if so, describe in detail the purpose(s), objective(s) and function(s) of said group, and describe in detail your activities or involvement with said inquiry including:

(1) whether on 3 October 1978, you and Mark Lane held a press conference in San Francisco in behalf of the "Peoples Temple's Citizens Commission of Inquiry" to refute claims that the Peoples Temple assisted or conspired with Reverend Jim Jones in leading the massacre at Jonestown; if so, describe in detail your activities or involvement with the said press conference and state the purpose of said press conference including:

(a) whether you have ever talked with, know or were a friend of Reverend Jones; if so, describe your activities or relationship with Reverend Jones; and

(b) whether you were involved in any manner with the incidents that transpired in Jonestown; if so, explain your involvement or activities in the aforesaid incidents;

(2) whether you engaged in a television interview during October 1978 in Los Angeles for the purpose of discussing who was responsible for the massacre at Jonestown; if so, describe the purpose of said press conference and your involvement in said press conference; and

(3) whether you assisted or engaged in any other activities with Mark Lane in behalf of the "Peoples Temple's Citizens Commission of Inquiry"; if so, describe your activities.

OBJECTION

Not relevant to the subject matter involved in the pending action. Privileged under the First Amendment to the United States Constitution.

INTERROGATORY NO. 30 [29]

State whether you have ever been a member, supporter, participant or involved in any manner with the goals, purposes or activities of the "Southern District of the Communist Party of California" (SDCPC) or the "Communist Party of the United States of America" (CPUSA); if so, describe in detail your activities, participation in, support of or involvement with either the SDCPC or the CPUSA, including:

(a) whether you personally accepted, received or were aware of the fact that the Communist Party of the United States of America contributed funds to the Friends of the Black Panthers; if so, describe your activities with or involvement in receiving funds from the CPUSA in behalf of the Friends of the Black Panthers;

(b) whether you sought funds from the CPUSA or the SDCPC for the Friends of the Black Panthers; if so, describe your effort in seeking said funds;

(c) whether during a meeting of the Friends of the Black Panthers on 13 April 1969 and located at 400 West Washington Boulevard, Los Angeles, California, you addressed a group of

approximately five hundred (500) persons and advocated a violent revolution against the United States government by use of explosives and guerilla warfare.

OBJECTION

Not relevant to the subject matter involved in the pending action. Privileged under the First Amendment to the United States Constitution.

[37] INTERROGATORY NO. 37 IN NO. 81-1407

State whether you contacted, communicated with or corresponded with any persons or sources prior to the said June 25, 1980 press conference. If so, list the name, address and telephone number of each of said persons and/or sources, including the following:

- (a) a detailed description of any information conveyed to you by the aforesaid persons and/or sources;
- (b) whether you had any prior relationship(s) or contact(s) with the aforesaid persons and/or sources; if so, describe in detail your aforesaid relationship(s) or contact(s);
- (c) identify the person(s) and/or source(s) and explain the information conveyed by the aforesaid person(s) and/or source(s) which you relied upon in concluding that plaintiff was "an accessory after the fact" in the assassinations of Orlando Letelier and Ronnie Moffitt; and
- (d) identify the person(s) and/or source(s) and explain the information conveyed by the aforesaid person(s) and/or source(s) which you relied upon in concluding that plaintiff had obstructed justice during the FBI and police investigations of the assassination of Orlando Letelier.

OBJECTION

Not relevant to the subject matter involved in the pending action.

INTERROGATORY NO. 43 [42]

State whether you have received any funds for the "Donald Freed Defense Fund" which was created to pay the legal costs of this litigation. If so, identify each contributor to said fund and state the amount of said contribution. Also, identify the person(s) or entity that paid for the advertisement in the Nation magazine which solicited funds for the "Donald Freed Defense Fund," and state the cost of said advertisement.

OBJECTION

Not relevant to the subject matter involved in the pending action. Privileged under the First Amendment to the United States Constitution.

INTERROGATORY NO. 59

State whether you have filed federal and state tax returns from 1970 through 1981. If so, produce copies of all your said tax returns from 1970 through 1981.

OBJECTION

Production of defendant's income tax return for the 12 years demanded is not relevant to the subject matter involved in the pending action.

3. Plaintiff moves to compel defendant Freed's answers to questions asked by plaintiff during the deposition of Donald Freed, March 22, 1983. The unanswered questions and defendant Freed's objections thereto are as follows:

(1) page 114, line 12

BY MR. BIERBOWER:

Q I would like to begin with Interrogatory Number 10, and you state in answer thereto that you were charged in 1970 with a federal offense under 26 U.S.C. § 5861. Could you tell me what the circumstances of that charge were? What is that section of the law?

MR. WULF: Let me interrupt. Let me clarify this. Donald has been arrested a long time ago. Donald can't remember the charge. I got this information from about 5861 from his lawyer who had represented him. To this day -- I forget what 5861 is. I assume you have the United States Code in the library.

THE WITNESS: I know what it has to do with.

BY MR. BIERBOWER:

Q It is called Prohibitive Acts. It shall be unlawful for any person to engage in business as the manufacturer or recorder or dealer in firearms. It goes on to list certain things like receiving possession of a firearm, transferred firearm violations, transport, deliver or receive any firearm in interstate commerce.

MR. WULF: Okay.

BY MR. BIERBOWER:

Q Could you explain?

MR. WULF: No. You have to clarify that question. You can ask him what the charge was and what the disposition was. Nothing else. I will instruct him not to answer about anything else.

Do you want to know the circumstances behind the charge?

MR. BIERBOWER: Yes.

MR. WULF: You won't find out today.

MR. BIERBOWER: You object to that?

MR. WULF: Yes.

MR. BIERBOWER: The basis for the objection?

OBJECTION

MR. WULF: The basis of the objection is I think that all he has to do -- he does not have to give you his version of what the facts were. That might be a problem under the privilege against self-incrimination. It would be my instruction to him therefore and I think all you are entitled to have is the official charge that was lodged against him and the disposition of the charges.

You can't take someone, call someone under the deposition and the party in the lawsuit and require him to relate to you events concerning a charge which were dismissed which might incriminate him and might not. I don't know. But I will forbid him to answer that question.

MR. BIERBOWER: I would state only that the matter bears on credibility and I would seek the information.

MR. WULF: The credibility is the charge got dismissed.

MR. BIERBOWER: And motivation of the witness, credibility and motivation of the witness.

(2) page 117, line 1

BY MR. BIERBOWER:

Q In response to Interrogatory Number 12 which asks whether or not you were arrested in 1969 and charged with unlawful possession of a destructive device, you have answered "yes," you were, and then said, "It was a total frame-up as proven by dismissal of charges prior to trial."

What were the circumstances regarding that arrest?

OBJECTION

MR. WULF: We will take the same position with respect to Interrogatory Number 12 as we did with the previous one.

MR. BIERBOWER: All right.

MR. WULF: Those charges were dismissed before trial. You are not entitled to go behind that.

MR. BIERBOWER: It is my position that I am indeed entitled to go behind that on the issues of credibility and motivation.

(3) page 117, line 17

BY MR. BIERBOWER:

Q Interrogatory Number 15. We asked you whether you are a member or supporter of a political party or parties in the United States, or elsewhere; and describe your participation or support for said party or parties.

Do you care to answer that question now?

OBJECTION

MR. WULF: No, he does not care to answer that information. The information is privileged under the First Amendment of the United States Constitution which protects free speech, freedom of press and freedom of political association. You can't make him tell you what his political affiliation and identifications, sympathies, or associations are.

BY MR. BIERBOWER:

Q With the objections so noted, would you answer the question?

MR. WULF: He will not answer the question.

MR. BIERBOWER: Again, it is my position that we need that information.

(4) page 118, line 14

BY MR. BIERBOWER:

Q Now with regard to Interrogatory Number 16, you have again objected to the entire interrogatory.

MR. WULF: The entire interrogatory.

BY MR. BIERBOWER:

Q It asks questions concerning whether or not you have been associated with the Black Panthers, friends of the Black Panther Party.

Do you care to answer that question now?

OBJECTION

MR. WULF: He does not because all of the information you are asking is privileged under the First Amendment of the United States Constitution. You can't haul a guy into court in this kind of a lawsuit and then try to extract this information from him which is privileged information. It can't be done.

It is objectionable for you to even ask to suggest you would want to violate the First Amendment this way.

(5) page 119, line 9

BY MR. BIERBOWER:

Q Have you ever been a member of or supporter of the John Brown Brigade?

OBJECTION

MR. WULF: Same answer. Objection. Privileged information under the First Amendment to the United States Constitution which guarantees freedom of political association.

(6) page 119, line 17

BY MR. BIERBOWER:

Q Have you ever been a leader, supporter or member of the "Friends of Operation Bootstrap"? State the objective or purpose of that group?

OBJECTION

MR. WULF: We decline to answer that question on the grounds that Mr. Freed's political association is protected in great detail by the First Amendment of the United States Constitution.

(7) page 120, line 3

BY MR. BIERBOWER:

Q Mr. Freed, have you ever been or are you a leader, supporter or member of the "Liberation Union"?

OBJECTION

MR. WULF: Same objection.

(8) page 120, line 7

BY MR. BIERBOWER:

Q Have you ever been a leader or supporter or member of the "Campaign for Democratic Freedom"?

OBJECTION

MR. WULF: Another question that intrudes critically into the protective area of association guaranteed by the First Amendment to the United States Constitution.

(9) page 120, line 13

BY MR. BIERBOWER:

Q Did you assist in organizing or participated in a three day conference during May 16 to 18, 1975, UCLA conference entitled "Conspiracy in America: From Dallas to Watergate"? If so, describe the topics and subject matters of said conference?

OBJECTION

MR. WULF: Same objection under the First Amendment to the United States Constitution. It is none of the plaintiff's business.

BY MR. BIERBOWER:

Q That is a completely different objection?

MR. WULF: It is the same objection.

MR. BIERBOWER: It is none of the plaintiff's business?

MR. WULF: Yes, that is what it is. The government can't ask it. You can't ask it. He is entitled to -- it is none of the government's business.

MR. BIERBOWER: Are you objecting on relevancy here?

MR. WULF: The First Amendment. You can't intrude on that in a civil lawsuit any more than the government can try to intrude upon the same protective and secretive area. He is constitutionally protected, his basic civil liberties. You can go to court and move to compel, obviously. We will thrash it out there.

(10) page 122, line 1

Have you ever been associated with, been a supporter or leader or member of the "People Temple's Citizens Commission of Inquiry"

OBJECTION

MR. WULF: Same objection. First Amendment grounds as previously recited.

(11) page 122, line 6

BY MR. BIERBOWER:

Q Did you participate with Mark Lane in a press conference in San Francisco on behalf of "Peoples Temple's Citizens Commission of Inquiry"?

OBJECTION

MR. WULF: Same objection. First Amendment. Freedom of speech, press and association.

(12) page 122, line 12

BY MR. BIERBOWER:

Q Have you ever been associated with the Reverend Jim Jones' Temple?

OBJECTION

MR. WULF: Same objection on First Amendment grounds.

(13) page 122, line 16

BY MR. BIERBOWER:

Q Were you involved in any way, manner, shape or form at the incidents in Jonestown involving the Reverend Jim Jones and the Peoples Temple?

OBJECTION

MR. WULF: Same objection on First Amendment grounds. May I add that in addition there are relevancy grounds. They are all irrelevant to the attempt to secure information relative to the allegations of this lawsuit.

MR. BIERBOWER: In response thereto it is our position they are quite relevant on the matter of credibility

and the predisposition of Mr. Freed to write this book and level these charges against the plaintiff, Mr. Phillips.

MR. WULF: Guilt by association, sir?

MR. BIERBOWER: That is what happened to Mr. Phillips it seems.

MR. WULF: He was associated with the CIA which for the last 30 years has engaged in murder, assassination, lying, manipulation.

MR. BIERBOWER: Do you want to be sworn in, Counsel?

MR. WULF: I would like to be.

Why don't you ask about the Communist Party?

MR. BIERBOWER: Is it in there?

(14) page 129, line 17

BY MR. BIERBOWER:

Q You were asked in Interrogatory Number 43 whether you received any funds for the "Donald Freed Defense Fund" to pay for the costs of this lawsuit. And if so, to identify each contributor and state the amount of each such contribution.

You objected to the latter part of that interrogatory. Do you wish to answer?

MR. WULF: Objected to the whole interrogatory.

BY MR. BIERBOWER:

Q You did acknowledge funds were contributed to pay for the defense of this lawsuit?

MR. WULF: Objection.

BY MR. BIERBOWER:

Q Do you wish to answer that question?

OBJECTION

MR. WULF: He does not. First Amendment privilege. National Association for the Advancement of Colored People vs. Button. The cite escapes me for the moment, but it is there in the Supreme Court 15 or 20 years ago.

We don't have to give out that information.

Argument

4. Fed. R. Civ. P. 26 sets forth the parameters of discovery, and provides, in pertinent part, as follows:

(b) SCOPE OF DISCOVERY. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

5. By his unanswered interrogatories and deposition questions, plaintiff seeks the following general information from defendant Freed:

(a) whether he was charged with certain offenses and the nature of and circumstances surrounding any such offenses (Deposition Questions Nos. 1 and 2, supra);

(b) whether he has filed tax returns during previous years (Interrogatory No. 59);

(c) whether he had sources for the information he stated as fact at the press conference, which is the very basis for plaintiff's action in Civil Action No. 81-1407 (Interrogatory No. 37);

(d) whether he is a supporter or member of certain political parties or organizations in the United States or elsewhere, and whether he has engaged in political activities (Interrogatories Nos. 15, 16, 30, Deposition Questions Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13, supra); and

(e) whether he is being supported financially or otherwise in the defense of plaintiff's action (Interrogatory No. 43, Deposition Question No. 14, supra).

6. The information sought by plaintiff's unanswered questions is reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1). Plaintiff is entitled to probe defendant Freed's past for evidence of criminal activities which may be admissible at trial. Plaintiff is entitled to know whether defendant Freed has filed income tax returns and to examine any returns filed. Plaintiff absolutely requires the information sought by Interrogatory No. 37. Plaintiff is also entitled to probe defendant Freed's political and other affiliations in order to develop admissible evidence probative of defendant Freed's motivations and intent in stating that plaintiff

was an accessory to the 1976 Letelier-Morritt murders. Plaintiff is entitled to the information sought in order to permit development of admissible evidence bearing on defendant Freed's credibility and biases. The information sought is central to plaintiff's case and the ability to effectively cross-examine defendant Freed at trial.

7. Defendant has objected on various grounds, including that the information sought is not relevant, that it is privileged under the Fifth Amendment (self-incrimination) or the First Amendment (freedom of association) and that it is "none of the plaintiff's business." As is explained in Paragraph 6, above, the information sought is relevant to plaintiff's case, is reasonably calculated to lead to the discovery of admissible evidence, and defendant's relevance objection fails under the standard set forth in Fed. R. Civ. P. 26(b)(1). It is not for defendant to state what is and is not the plaintiff's business. With respect to defendant Freed's Fifth Amendment objection, it is sufficient to state that any applicable statute of limitations has lapsed with respect to the information sought by Deposition Questions Nos. 1 and 2, supra. The question remains, however, whether defendant Freed raises a valid First Amendment privilege which makes information sought concerning his political activities and association fall outside the scope of discovery pursuant to Fed. R. Civ. P. 26(b)(1) ("parties may obtain discovery regarding any matter, not privileged . . .").

as is
amended
privilege
stated

8. The privilege raised by defendant Freed involves whether compelling disclosure of the information sought would impermissibly impinge upon his First Amendment freedom of association. Counsel for defendant Freed refers to NAACP v. Button, 371 U.S. 415 (1963). See Dep. of Donald Freed, p. 129. In Button, the Supreme Court interpreted a Virginia statute which subjected to criminal prosecution any person who advises another that his rights have been infringed and refers him to an attorney or group of attorneys. The Supreme Court held the statute to be an unconstitutional limitation on First Amendment freedoms of expression and association. Id. at 436-8. In NAACP v. Alabama, 357 U.S. 449 (1958), the Supreme Court held that a state court order requiring the N.A.A.C.P. to produce lists of its members in the state infringed upon the members' freedom of association under the First and Fourteenth Amendments. The U.S. Court of Appeals for the D.C. Circuit considered the validity of an assertion of a First Amendment privilege not to disclose information sought in civil discovery in Black Panther Party v. Smith, 661 F.2d 1243 (1981), vacated mem., _____ U.S. _____ (198__). In Black Panther, the plaintiff claimed a First Amendment privilege with respect to requests for names of Black Panther Party leaders and members. Id. at 1264. In holding that membership names were entitled to some protection, the court in Black Panther cited many cases, including NAACP v. Alabama, supra, 661 F.2d at 1265. The court stated:

The need for First Amendment protection should be carefully scrutinized. See NAACP v. Alabama, supra, 357 U.S. at 460-462, 78 S.Ct. at 1170-1171; National Right to Work, supra, 590 F.2d at 1152. The argument in favor of upholding the claim of privilege will ordinarily grow stronger as the danger to rights of expression and association increases. We emphasize, however, that the litigant seeking protection need not prove to a certainty that its First Amendment rights will be chilled by disclosure. It need only show that there is some probability that disclosure will lead to reprisal or harassment.

Black Panther, supra, at 1267-8.

9. In the case at bar, plaintiff does not seek information which is constitutionally privileged. Plaintiff specifically does not seek disclosure of membership lists. Plaintiff only seeks information concerning defendant Freed's past associations and activities. The information is highly relevant to defendant Freed's intent and credibility. There is no possibility that defendant Freed's disclosure will lead to reprisals or harassment against him. There is, accordingly, no chilling of defendant Freed's First Amendment rights which would result from the disclosure of the information sought by plaintiff's motion. Defendant Freed should not be permitted to use the First Amendment as a sword by drawing a First Amendment curtain across his past associations and activities and thereby preventing plaintiff's development of admissible evidence bearing on defendant Freed's motives, sources and credibility.

For the foregoing reasons, plaintiff's motion to compel⁴ should be granted, and defendant Freed should be ordered to answer the unanswered interrogatories and deposition questions and to produce for plaintiff's inspection copies of tax returns filed by defendant Freed from 1971 to date.

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